SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1973

IDA PHILLIPS, PETITIONER

v.

MARTIN MARIETTA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (A. 30a-38a) is reported at 411 F.2d 1. That court's denial of rehearing and rehearing *en banc*, with three judges dissenting (A. 42a-52a), is reported at 416 F.2d 1257. The opinion of the district court (A. 22a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals (A. 39a) was entered on May 26, 1969. Timely petitions for

rehearing and rehearing *en banc* were denied on October 13, 1969 (A. 42a-43a). The petition for a writ of certiorari was filed on January 10, 1970, and granted on March 2, 1970 (A. 55a). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Title VII of the Civil Rights Act of 1964, an employer may, in the absence of business necessity, refuse to hire women with pre-school age children while hiring men with such children.

STATUTE INVOLVED

Section 703 of Title VII of the Civil Rights Act of 1964 provides in pertinent part:

42 U.S.C. 2000e-2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

* * * *

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin

is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *.

STATEMENT

On September 6, 1966, petitioner was denied employment as an assembly trainee by the respondent corporation solely because she was a woman with pre-school age children (A. 3a-4a, 16a-17a). She filed a charge of discrimination with the Equal Employment Opportunity Commission, and, on July 14, 1967, the Commission found reasonable cause to believe that the respondent had "violated Title VII of the Civil Rights Act of 1964 by its refusal to consider a woman with pre-school age children for employment" (A. 10a). On November 9, 1967, the Commission notified petitioner that its conciliation efforts had failed to achieve voluntary compliance (A. 11a-12a). Petitioner then brought the present suit to enforce her rights under Title VII.

For purposes of ruling on the respondent's motion for summary judgment, the district court assumed that respondent "does employ males with pre-school age children in the position of Assembly Trainee" (A. 23a). But the court eliminated the essence of the petitioner's complaint by striking, as beyond the reach of the statute, the allegation of discrimination directed particularly against mothers with pre-school age children (A. 22a). Thus viewing the complaint as simply alleging discrimination based solely on sex, the court granted the respondent's motion for summary judgment, on the basis of an uncontroverted

showing that a larger percentage of the women, as compared with the men, who applied for the position of assembly trainees were hired.

The court of appeals affirmed, stating (A. 36a):

> * * * The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta. The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired. * * *

A petition for rehearing was denied (A. 42a-43a), with three judges dissenting from the denial of rehearing *en banc* (A. 43a-52a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Civil Rights Act of 1964, Congress has entrusted the United States Equal Employment Opportunity Commission and the Attorney General with important responsibilities for the enforcement of the prohibitions in Title VII of that Act against discrimination in employment based on race, color, religion, sex or national origin. The holding below—that an employment practice under which women, but not men, were required to be wholly without preschool age children does not violate the statute's proscription against discrimination on the basis of sex—is in conflict with the interpretation of the statute

followed by the Equal Employment Opportunity Commission and is contrary to the federal policy of encouraging unemployed women with pre-school age children to seek gainful employment as an alternative to welfare payments.[1]

The decision below directly affects a substantial number of women in the labor market, many of whom are the sole or principal income-producing member of households with children and thus are among those in our society least able to afford restrictions upon their employment opportunities.[2] The burden falls

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[1] See, *e.g.*, President Nixon's Address to the Nation on Domestic Programs, Weekly Compilation of Presidential Documents, Vol. 5, No. 32, August 11, 1969, p. 1108:

> As I mentioned previously, greatly expanded day-care center facilities would be provided for the children of welfare mothers who choose to work. However, these would be day-care centers with a difference. There is no single idea to which this administration is more firmly committed than to the enriching of a child's first 5 years of life, and thus helping lift the poor out of misery, at a time when a lift can help the most. Therefore, these day-care centers would offer more than custodial care; they would also be devoted to the development of vigorous young minds and bodies. As a further dividend, the day-care centers would offer employment to many welfare mothers themselves.

Moreover, as principal financial contributor to the Aid to Families with Dependent Children Program administered by the States under the Social Security Act (as well as in its role as tax collector), the United States has a fiscal interest in the consequences of this litigation. See *King* v. *Smith*, 392 U.S. 309; *Lewis* v. *Martin*, No. 829, this Term, decided April 20, 1970.

[2] In March 1968, fourteen percent (4.1 million) of all women in the labor market were mothers with children un-

heaviest among Negroes and other non-whites.[3] Moreover, application to the prohibitions in Title VII against discrimination based on race, color, religion, or national origin of the rationale adopted by the court of appeals[4] would comprehensively limit the Act's effectiveness in insuring equality of employment opportunities for all persons in the United States. Under this reasoning, the Act would, for example, have no application to discrimination against Catholics with children, or against Scandinavians with education beyond the sixth grade.

The holding of the court of appeals that employment qualifications not required of men can be imposed on women, without the justification of business necessity, is contrary to both the language and the legislative history of Title VII. To require of prospective women employees that they not have preschool age children, while not requiring the same of men, is to discriminate against women on the basis

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der six years of age. Of this number, 33 percent were either heads of their households or had husbands whose incomes were below $5,000 in 1967. *Who Are the Working Mothers?*, U.S. Department of Labor, Wage and Labor Standards Adm., Women's Bureau (Leaflet 37, revised January, 1970).

[3] Among all non-white mothers with children under six years of age, a larger percentage worked (45 percent) than did white mothers with such children (27 percent). *Ibid.* A revision of this leaflet to be published in May 1970 will show substantially the same figures as of March 1969 as those used here and in note 2, *supra*.

[4] "When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin" (A. 35a).

of sex in the "terms" or "conditions" they must meet to be employed—which is precisely what the Act in terms forbids, in the absence of a showing of overriding business necessity.

ARGUMENT

The summary judgment in this case was based on the factual premise that the respondent excludes women, but not men, with pre-school age children from employment as assembly trainees, and that it does so without regard or inquiry as to whether the individual women affected are capable of regular attendance or are otherwise able satisfactorily to perform the work required. No evidence was offered to establish that this hiring practice was predicated on any legitimate business consideration related to the ability of such women to perform the work, or to the safety and efficiency of the respondent's business operations. Specifically, there was no showing that such women as a class had a higher than average absentee rate, that they could not work certain shifts or necessary overtime, or that they had any other attribute which limited their utility to the respondent. Much less did respondent show that *all* women with pre-school age children were unable to perform adequately.

The courts below, therefore, did not rely on any "overriding business necessity," [5] and thus did not invoke the statutory exception for a "bona fide occu-

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[5] See *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980, 989 (C.A. 5), certiorari denied, February 24, 1970, No. 1015, this Term.

pational qualification,"[6] in holding that the respondent's hiring policy did not violate Title VII. Instead, the court of appeals' holding is explicitly based on a construction of the statute which condones discrimination on the basis of sex so long as there is an additional, apparently neutral, reason for the otherwise unlawful employment practice.

This holding contravenes the plain language of Section 703 which makes it an "unlawful employment practice for an employer * * * to fail or refuse to hire * * * or otherwise to discriminate against any individual with respect to his * * * terms [or] conditions * * * of employment, because of such individual's race, color, religion, sex, or national origin * * *." To require of prospective women employees that they not have pre-school age children, while not requiring the same of men, is to "refuse to hire" on the basis of sex and constitutes discrimination against women in the "terms" or "conditions" they must meet to be employed. The fact that some women, even if the number is substantial, have met this "term" or "condition" does not eliminate the disparate treatment received by those women who do not met this qualification which is not required of men. So long as sex determines to whom an employment qualification is applied, the qualification is a form of employment discrimination based on sex which is proscribed by the Act unless justified as a "bona fide occupational qualification." Cf. *Lane* v. *Wilson*, 307 U.S. 268; *Goss* v. *Board of Education*, 373 U.S. 683; *Robinson* v. *Florida*, 378 U.S. 153.

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[6] Section 703(e)(1), 42 U.S.C. 2000e-2(e)(1), *supra*, pp. 2-3.

The court of appeals' contrary holding—that "[a] per se violation of the Act can only be discrimination based solely on one of the [Act's prohibited] categories" (A. 35a)—is also refuted by the Act's legislative history. The Senate, by a roll call vote, specifically rejected a proposed amendment which would have inserted the word "solely" in Title VII prior to each enumeration of the specifically proscribed categories. 110 Cong. Rec. 13837-13838. In speaking against the proposal, Senator Case, a joint floor manager of Title VII, noted that the "difficulty with this amendment is that it would render Title VII totally nugatory. * * * [It] would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless." *Id.* at 13837.[7] Nor is there support in the legislative history for the court of appeals' apparent conclusion that Congress intended to allow employers to base their employment practices upon unsupported presumptions about "the differences between the normal relationships of working fathers and working mothers to their pre-school age children * * *" (A. 37a). Instead, the intent of Congress was to insure women (and others) equal opportunity to obtain and hold employment[8]—an objective consistent with its

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[7] See, also, the remarks of Senator Magnuson to the same effect. 110 Cong. Rec. 13837. And see the opinion in this case dissenting from denial of rehearing *en banc* (at A. 49a-52a).

[8] See statements of Congresswomen May (110 Cong. Rec. 2582), Kelly (110 Cong. Rec. 2583) and Bolton (110 Cong. Rec. 2720). See, also, *Weeks* v. *Southern Bell Telephone*

earlier enactment of legislation guaranteeing women equal pay for equal work.[9]

The statute provides for exception to the broad mandate of Section 703(a) against sex discrimination only upon a showing that such an exception constitutes a "bona fide occupational qualification" within the meaning of Section 703(e)(1). Since Title VII is a humanitarian and remedial statute serving an important public purpose, such an exception should be narrowly construed. See *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493. Indeed, the court below had previously pointed out that "[t]he legislative history [of Title VII] indicates that this exception was intended to be narrowly construed." *Weeks* v. *Southern Bell Telephone Co.*, 408 F.2d 228, 232 (citing 110 Cong. Rec. 7213 and H. Rep. No. 914, 88th Cong., 1st Sess.). Accordingly, in order to rely upon this exemption, the respondent in this case would have to prove that all, or substantially all, women with pre-school age children are significantly

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Co., 408 F.2d 228 (C.A. 5), where, in rejecting an assertion that it should be permissible to bar women from a certain job classification because it occasionally necessitated "late hour call-outs," the court stated (*id.* at 236):

> * * * Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. * * *

[9] Equal Pay Act of 1963, 29 U.S.C. 206(d).

less able or willing than other employees to make arrangements for the care of their children, or are otherwise materially less satisfactory in performing the work of assembly trainees, so as to justify the total exclusion of such women as (in the words of Section 703(e)(1)) "reasonably necessary for the normal operation of that particular business or enterprise." [10] The whole meaning and purpose of Title VII is that such women (or any other category of employees limited by race, color, religion, sex, or national origin) cannot be barred from employment merely on the factually unsupported premise that they as a class are less dependable or efficient employees. Instead, the respondent must, in the absence of proper proof of overriding business necessity, provide such women individually the same opportunity to demonstrate their ability to perform the job as is provided other employees, including similarly situated men. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7); *Weeks* v. *Southern Bell Telephone Co.*, *supra*; *Rosenfeld* v. *Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Calif.); *Cheatwood* v. *South Central Bell Telephone Co.*, 303 F. Supp. 754 (M.D. Ala.). Cf. *Carrington* v. *Rash*, 380 U.S. 89, 96. In contrast to the decision below, those above-cited con-

[10] Working mothers do make arrangements for the care of their children. In February 1965, 47 percent of such children were cared for in their own homes by other members of the household, 31 percent were cared for in the homes of others, and 6 percent received group care in child-care centers or other similar facilities. Sixteen percent were cared for by other arrangements. *Who Are the Working Mothers?*, U.S. Department of Labor, Wage and Labor Standards Adm., Women's Bureau (Leaflet 37, revised January, 1970). See, also, n.1, *supra*.

form with, and rely upon, the Equal Employment Opportunity Commission's published interpretations of Section 703.[11] Since that agency has been charged

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[11] The Commission's "Guidelines on Discrimination Because of Sex," 29 C.F.R. § 1604.1(a), state in pertinent part:

> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> (i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
>
> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. * * * The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

Moreover, at 29 C.F.R. § 1604.3(a), the Commission specifically addressed itself to discrimination against married women as follows:

> (a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

In *Sprogis* v. *United Air Lines*, 62 Lab. Cas. ¶ 9399 (N.D. Ill., January 21, 1970), this rationale was applied to an employer's practice of firing female stewardesses, but not male stewards, who married. Within the Fifth Circuit, however, a contrary result was reached on the same facts because of the decision below. *Lansdale* v. *United Air Lines*, 62 Lab. Cas. ¶ 9417 (S.D. Fla. December 2, 1969).

by Congress with the primary responsibility for the administration of Title VII, its interpretations of the statute are of course entitled to deference. See *United States* v. *Correll*, 389 U.S. 299, 306-307; *Udall* v. *Tallman*, 380 U.S. 1, 16; *NLRB* v. *Hearst Publications*, 322 U.S. 111.

Title VII forbids the imposition of any term or condition of employment which adversely affects an individual on the basis of his race. *United States* v. *Sheet Metal Workers International Association*, 416 F.2d 123 (C.A. 8); *Griggs* v. *Duke Power Co.*, C.A. 4, No. 13,013, decided, January 9, 1970; *Local 53, International Association of Heat and Frost Insulators* v. *Vogler*, 407 F.2d 1047 (C.A. 5); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (C.A. 5).[12] An employer's refusal to hire otherwise qualified Negroes with preschool age children, while hiring whites with such children, is obviously proscribed. Since Section 703 (a)(1) (*supra*, p. 2) textually affords the same protection against discrimination in employment whether based on sex or race, the respondent's hiring practice here is equally prohibited in the absence of proof of an overriding business necessity (Section 703(e)(1), *supra*, pp. 2-3). To hold otherwise would be to deny the Act's protection to some of the employment applicants most in need of that protection.

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[12] This principle follows from this Court's Fourteenth and Fifteenth Amendment cases. See, *e.g.*, *Guinn* v. *United States*, 238 U.S. 347; *Lane* v. *Wilson*, *supra*; *Anderson* v. *Martin*, 375 U.S. 399; *Louisiana* v. *United States*, 380 U.S. 145; *Gaston County* v. *United States*, 395 U.S. 285.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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